GOVERNMENT OF THE DISTRICT OF COLUMBIA

EXECUTIVE OFFICE OF THE MAYOR

Office of the General Counsel to the Mayor

Kathleen Patterson
District of Columbia Auditor
717 14th Street, NW
Suite 900
Washington, DC 20005

March 24, 2017

Dear Ms. Patterson,

On behalf of the Office of Administrative Hearings Advisory Board, I first would like to thank you – and the Center for Court Excellence – for examining the Office of Administrative Hearings (OAH) adjudicative system. The report was the product of a tremendous number of volunteers and staff who generously gave their time and expertise towards the shared goal of ensuring that every Washingtonian can access a fair, efficient and quality system of administrative justice, and we appreciate your partnership in this endeavor.

In this case, however, we have significant concerns – methodological, substantive, and tonal – with the recent audit, *District of Columbia Office of Administrative Hearings: Review and Proposed Recommendations*. Consequently, we would appreciate if you would include this letter alongside any posting of the CCE report. We further urge that you not adopt many of CCE's key findings and recommendations, pending a new analysis of the issues involved. Finally, we think that it was premature to offer Council legislation embodying the CCE recommendations.

Methodological Validity

The chief conclusion of CCE – that the "OAH has not yet fulfilled its mission of creating a fair, efficient, and effective system of administrative hearings" – is simply not supported by the evidence that was gathered. CCE relied heavily on surveys, but did not make any effort to understand whether the OAH judges actually reached the right result legally. It did not ask whether OAH judges were fair, in that they acted independently of the agencies whose decisions were being challenged. It asked about

whether litigants felt like they received decisions in a timely fashion, but that cannot be the full measure of whether a court system operates efficiently.

Surveys of litigants are inherently problematic: rulings disappoint, and surveyed litigants who are disappointed in a result may express that disappointment by giving the judges or the Court poor marks, even where those marks are not warranted. Moreover, when soliciting respondents, CCE placed inserts into Final Orders, promising entry into a $50 raffle *if* litigants answered the CCE survey. This variety of solicitation is inappropriate and breaks with judicial decorum. Relatedly, CCE only conducted surveys in English. This creates an access bias against individuals who predominantly speak another language.

Beyond this, CCE was unable to secure enough survey responses from litigants to lend confidence in their findings. Yet, CCE did not discount its findings even when few individuals responded. After sending 5,000 surveys, CCE received only a tiny number of replies – perhaps from those who disproportionately had an axe to grind. One cannot base sweeping conclusions – conclusions that could significantly alter the functioning of OAH – on so few individuals.

To address sample bias, CCE should have employed some degree of methodological sophistication, such as by assessing whether litigation outcome had any bearing on participant response. But far from it, it is unclear that CCE even accounted for self-selection and bias issues.

The report's unclear focus marred its conclusions. To many interviewees, it was unclear whether CCE's focus was on documenting past problems and issues, current issues, or whether it was trying to chart a course for the future. According to some of the judges who discussed the report with the Advisory Board at our September 29 meeting, the focus seemed to change mid-stream. Tied to this, many judges were frustrated that CCE ignored what OAH is doing now to address some of the issues that the report flagged. This issue is particularly relevant because the report was written over a long period of time. By publication, many of the highlighted issues were already addressed.

The Advisory Board further questions the way that CCE handled and publicized its findings. Even before publication, CCE was using its findings for fundraising purposes. Such behavior undermines any perception of objectivity; after all, it is hard to fundraise by saying, "CCE finds all is well with OAH." Fundraising is more effective when the nonprofit is issuing a *cri de coeur* for justice.

As a final methodological point, we note that agencies customarily have an opportunity to respond *before* auditor reports are published. The entire response is then attached to the report. In this instance, it was surprising that the CCE report was published and distributed *before* OAH, the Advisory Board, or the Commission on Selection and Tenure (COST) could respond. The discussions with the Chief Judge or the staff that CCE or the Auditor had prior to publication could not capture the full range of responses and critiques that the Advisory Board, the COST and the judges themselves might have offered.

Substantive Concerns

Besides methodological concerns, we feel that many of the substantive recommendations are inapt. For example, the report suggested abolition of the OAH Advisory Board, suggesting that this Board fold into COST. However, this reflects no appreciation of the different roles that the Advisory Board and COST play. There was furthermore no substantiation for this suggestion to fundamentally reorganize some of the governmental and advisory functions that the Advisory Board and the COST respectively play. Before considering such a step, such a proposal should be vetted with the Advisory Board, the COST, the Chief Judge, the judges themselves and other stakeholders.

CCE lacked adequate substantiation for many of its recommendations. It frequently cited prevailing practices in other jurisdictions, but failed to offer any evidence that these jurisdictions' administrative hearing procedures were superior – in reaching the legally accurate result, in impelling agencies to abide by the law, in providing a forum for speedy and impartial reconsideration of agency rulings, or by any other measure. That is, the relevant consideration is not nose counting of specific practices, but what practices are backed by empirical evidence to show that they produce more efficient, just and equitable outcomes. CCE failed to provide this, instead offering reforms that lacked justification.

The Advisory Board is working with Chief Judge Adams and his staff to address the issues that he has correctly identified as major ones for the OAH. We believe that the Chief is on the right track in equalizing workloads among the judges, recommending excellent new judges to the COST, addressing the occasional performance issues among the professional cadre of judges, encouraging the timely disposition of cases, working to achieve an agreement with the bargaining unit while taking other steps to rebuild morale, and building a strong help center for unrepresented litigants.

The Advisory Board is urging OAH (and trying to help it secure resources) to address what we see as a critical issue, agreeing with the CCE report: making sure that opinions are online; that litigants and the public can learn the status of a case online, 24 hours a day; and that individuals can file papers electronically. It is through practical, achievable steps like these – rather than a wholesale migration of the Office of Administrative Hearings into something like an agency – that OAH will take the next steps forward in its development as an effective, respected central panel.

All that said, we agree not only with the points the report made about case processing and technology, but also agree that it would be sound to have OAH jurisdiction established by statute, rather than by MOU. However, we see no evidence that when an agency "pays" for appeals through an MOU, that it somehow receives favorable treatment as a result.

Overall Impression

Overall, the report gives OAH a harsh critique – that it's not fulfilling its mission of creating a fair, efficient and effective system of administrative hearings. CCE cited no instances, quoted no persons, or nor adduced any other evidence that the OAH central panel is unfair – quite a charge to lay upon a panel of conscientious judges who take pride in their independence from the agencies. As to efficiency, we think it merits headlines and congratulations, rather than a mere mention amid a critique of delay and allegedly poor case management, that of 18,000 open cases in FY 2010, 400 remained open by the end of 2012, and by FY 16, only 104 cases were more than a year old – a number we believe to be falling. (p. 44). Even assuming all of those 104 were stale or overdue – an institution that cuts its backlog by 74% is to be commended for great progress.

For almost every critique, OAH would have an answer or a plan for addressing the critique – but CCE leapt right to its solutions, rather than asking what is being done, and reporting on the adequacy or progress of OAH's solution.

Thank you for considering these examples of our concerns with the CCE report, which the Advisory Board discussed at our fall meeting and adopted at our March meeting. We look forward to working with you to support OAH in its continuous quest to provide an independent, fair, timely and transparent resolution of disputes with government agencies.

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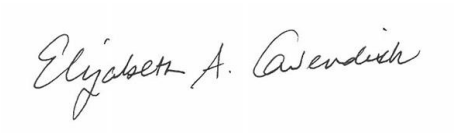
Sincerely,



Betsy Cavendish
Chair, Advisory Board to the Office of Administrative Hearings

Cc: Toni Jackson, OAG
Melinda Bolling, Director, DCRA
Wayne Turnage, Director, HCFA
Professor Alice Thomas
Chief Judge Adams
Vanessa Natale